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No. 89-600

In the
Supreme Court of the United States
October Term, 1989

WILLIAM ST. CLAIR and JOHN SHELTON,
Petitioners,
v.
CITY OF CHICO and COUNTY OF BUTTE,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the complaint in an action under 42 U.S.C. § 1983 adequately alleges that defendants have reached a final decision on plaintiffs' land use applications, may the court dismiss the action as unripe, on a motion under Fed. R. Civ. Proc. 12(b)(1) claiming lack of subject matter jurisdiction, without permitting plaintiffs a full and fair opportunity to discover and present evidence supporting jurisdiction?

2. What procedural safeguards are afforded plaintiffs in 42 U.S.C. § 1983 actions in resisting motions to dismiss for lack of subject matter jurisdiction on the ground of unripeness, where the complaint on its face adequately alleges a final decision on plaintiffs' land use applications?

3. Are the standards and procedural safeguards for determining ripeness in land use cases under 42 U.S.C. § 1983 materially different from those generally applicable in deciding subject matter jurisdiction in other types of cases?

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Petitioners William St. Clair and John Shelton respectfully pray this Court to issue a Writ of Certiorari to review the opinion and order of the United States Court of Appeals for the Ninth Circuit dated July 13, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was rendered on July 13, 1989, and is reported at 880 F.2d 199 (9th Cir. 1989). It is attached hereto as Appendix

(App.) A. The opinion of the United States District Court for the Eastern District of California, granting respondents' motions for dismissal of petitioners' action, was rendered on February 12, 1988 in open court, and is unreported. It is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit, affirming the district court's dismissal of petitioners' action, was entered on July 13, 1989. Petitioners have timely filed this Petition for a Writ of Certiorari, and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the person injured in an action at law, suit in equity, or other proper proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Petitioners are and at all times material herein were engaged in the business of real estate development. Petitioners brought this action in the United States District Court for the Eastern District

of California, alleging that respondents City of Chico and County of Butte had taken their property without just compensation and had denied them equal protection of the laws in connection with a real estate development project known as Ravenwood, in violation of 42 U.S.C. § 1983. The jurisdiction of the district court was based on 28 U.S.C. § 1331. Respondents moved to dismiss petitioners' action under Fed. R. Civ. Proc. 12(b)(1) and 12(b)(6), alleging, among other things, that the action was not ripe for adjudication. Taking respondents' assertions of fact to be true and brushing aside petitioners' requests for discovery, the district court granted respondents' motions, holding that this action was not ripe. On appeal, the United States Court of Appeals for the Ninth Circuit affirmed.

In 1980, petitioners were the owners of a tract of land located on the northern border of the City of Chico, California, in the County of Butte. Petitioners planned to build a residential real estate development on the land, to be known as Ravenwood. The project was to include more than 300 moderately-priced homes, selling for an average price of $60,000 to $70,000.

In order to construct the Ravenwood project, petitioners had to obtain a number of government approvals and permits. Included among the aspects of the project for which petitioners had to obtain government approval was a means of sewage disposal and/or treatment. In this regard, petitioners had two available options. First, they could develop the project under the authority and jurisdiction of the County of Butte, by developing and submitting plans for an independent sewage treatment facility that would meet the applicable water quality standards. Second, they could develop the Ravenwood project under the authority and jurisdiction of the City of Chico, by annexing the property to the City and connecting it to the City sewer system. Petitioners pursued both courses of action, but their efforts were thwarted by respondents' illegal actions.

Petitioners first sought and received a zoning change necessary for development of the project. In making that application, petitioners made a detailed presentation of the Ravenwood project, permitting every affected government and agency to comment on or object to any aspect of the project. By doing so, petitioners were able to address any concerns or objections raised at an early

stage, and to obtain the approval of the affected governments and agencies. Upon the completion of that process, the County granted the zoning change, subject to certain specified conditions incorporating the governments' and agencies' concerns. Petitioners were, at all times material herein, ready and able to meet those conditions, with the exception of one condition, which gave rise to this action.

One of the conditions imposed by the County was that petitioners connect the Ravenwood project to the City of Chico sewer system. Petitioners applied for such a connection. In response, the City notified petitioners that it had approved their application, and that it would connect Ravenwood to the City sewer system upon the payment of a connection fee and the meeting of certain conditions, including the execution of an annexation petition or agreement. Petitioners agreed to pay the connection fee and to meet the specified conditions.

Before they were able to do so, however, respondent City of Chico, without even informing petitioners of its actions, imposed additional requirements for connection of the Ravenwood project to the City sewer system. Even though it had already approved the connection, the City informed the County of Butte that it would honor its commitment only if the County acceded to a series of political concessions having no relation to the Ravenwood project. Specifically, the City demanded that the County agree to seek no changes in the "green line," a line of demarcation limiting urban expansion in the Chico area; that the County zone certain parcels of land (not including the Ravenwood property) outside the City but within the County in a certain manner; and that the County agree to the establishment of an urban plan committee, for consideration of general matters regarding urban planning in the area. None of these concessions were necessary for the Ravenwood project to go forward, none of them furthered any legitimate State interest with relation to the project, and none of them bore any legitimate relation to the project. Instead, the conditions were arbitrary and capricious, and constituted unconstitutional conditions placed by respondent City of Chico on petitioners' ability to develop the property in any substantial manner. They were also discriminatory, as the City singled out petitioners for such treatment, while permitting other, politically-favored developers to con-

struct similar projects without any such conditions.

Respondent County of Butte refused to accede to those conditions. The City, however, knowing that its position would make a sewer connection impossible, refused to relent, and continued to make a sewer connection contingent on County agreement to its demands. Because the conditions were not within petitioners' control or influence, petitioners were unable to meet the conditions by their own actions. They endeavored to convince the City to drop its conditions, but the City refused to do so. After several months, petitioners realized that the City and the County had reached an impasse, and that a sewer connection would not be possible.

Petitioners therefore applied to the County of Butte for approval of a sewage treatment facility for the project. That facility met all applicable standards and requirements with regard to water quality, sewage capacity, and the public health, safety, and general welfare, and had been approved by the California Regional Water Quality Control Board and the County of Butte Planning Commission. The County Board of Commissioners, however, rejected petitioners' application, and continued to require connection of the Ravenwood project to the City sewer system. No appeal was available from the County's decision. Because the County's objection was to the construction of a sewage treatment facility as opposed to connection to the City sewer system, and was not tied to any deficiencies in the design of the system proposed by petitioners (the County cited no such deficiencies to petitioners), petitioners were unable to win approval by submission of an amended application.

The County's decision, like the City's before it, was arbitrary and capricious, and did not further any legitimate State interest with regard to the project. It was also discriminatory, as the County had approved similar sewage treatment facilities for similar projects.

Both the City's and the County's decisions were final in all respects. In both instances, the decisions were made at the highest levels of the respective governments, from which no appeal was possible. They were not rules of general applicability, but instead were decisions made with specific reference to the Ravenwood project. They were not based on specific aspects of the applications, such as size, location, design, or engineering, which were within the power of petitioners to change. The City's decision was

based on its desire to extract political concessions from the County, having nothing to do with the Ravenwood project at all. Petitioners had no power to affect that decision in any way. The County's decision, apparently, was based on its resolve to withstand the City's pressure. Again, petitioners could not, by further applications, change that decision. Neither respondent informed petitioners that its decision was subject to further review. Instead, despite several efforts by petitioners to break respondents' deadlock, petitioners were unable to do so, and respondents indicated that their decisions were final.

As a result of respondents' actions, the Ravenwood project was entirely destroyed. In fact, all substantial use of the property was precluded, as no such development could occur without sewage treatment or disposal. As a result thereof, petitioners eventually entered into bankruptcy, as a part of which they lost the subject property.

Petitioners brought this action, alleging that respondents' actions were arbitrary and capricious, and that respondents had denied them the equal protection of the laws and had taken their property without just compensation. Almost immediately, respondents moved to dismiss petitioners' action, a course of conduct that continued until entry of the district court's judgment. Petitioners attempted to conduct discovery, but with the exception of some initial written discovery, were thwarted in their efforts by respondents. On one occasion, respondents moved for a protective order blocking the taking of scheduled depositions, on the ground that no discovery should be permitted before resolution of respondents' motions for dismissal.

The district court granted respondents' motions, holding that petitioners' action was not ripe for adjudication, on the ground that respondents had not made a final decision on petitioners' applications. On appeal, the court of appeals affirmed for essentially the same reason, holding that respondents had not reached an impasse. Because these holdings constitute resolutions of fact made by the lower courts without affording petitioners an adequate opportunity to obtain discovery of the relevant facts, which are in the possession of respondents, and because the lower courts appear to be using the principle of ripeness as a means of

early and unwarranted dismissal of land use cases in order to prevent the bringing of such cases in the federal courts, petitioners seek a Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I

Certiorari is Necessary to Clarify and Preserve the Jurisdiction of the Federal Courts

In their third amended complaint, petitioners alleged that respondents had taken their property without just compensation and had denied them the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. The City of Chico, for its part, had decided that it would permit petitioners to connect the Ravenwood project to the City sewer system only if the County of Butte agreed to three political concessions: (1) agreement to new urban boundaries, to remain in place for ten years or until the urban population reached 100,000; (2) agreement to an urban plan committee, which would adopt a comprehensive general plan for the area; and (3) agreement to specified zoning for property outside the new urban boundaries. None of these conditions had any relation to the Ravenwood project or to petitioners' application for a sewer connection, and none of them were within petitioners' ability to perform. Thus, there was no nexus between the conditions imposed and any legitimate state interest with regard to petitioners' application, and the City's actions constituted unconstitutional conditions, made actionable by this Court in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987).

The County of Butte, for its part, then rejected petitioners' application for an amendment of the development plan to permit construction of a sewage treatment facility, and continued to condition approval of the Ravenwood project on connection to the City sewer system. That condition also had no nexus to any legitimate

state interest with regard to petitioners' application, since a sewer connection had already been made impossible by the City's conditions and the County's refusal to agree to them, and since the proposed sewage treatment facility met all requirements for protection of the public health, safety, and general welfare. Thus, the County's actions were likewise unlawful.

Respondents' determinations were not applications of general zoning regulations, from which petitioners could appeal or seek variances. Instead, they were final decisions made at the highest levels of the respective governments, with specific application to the Ravenwood project, from which no appeal was possible and no variance could be obtained. The City and the County did not set general policies, which might be relaxed to accommodate individual circumstances. Indeed, the Ravenwood project met the applicable zoning requirements. The City and County made specific decisions applicable to Ravenwood alone. The City's conditions, while attached to Ravenwood, were not related to that project at all, and were directed to the County rather than to petitioners. Thus, petitioners were unable to meet those conditions by any actions of their own, no matter how willing they were to satisfy them. The County's decision was similarly final: the County denied petitioners' application for approval of a sewage treatment facility not because of any deficiencies in petitioners' application or the facility's design, but because it was something other than connection to the City sewer system. With that connection foreclosed, petitioners could do nothing to satisfy the County's demands.

Like the characters in *Catch-22*, petitioners were caught in an absurd and impossible position. The County required connection to the City sewer system. The City refused to permit that connection unless the County agreed to certain unrelated political concessions. The County refused to agree to those concessions. But the County also refused to permit a reasonable amendment of the development plan (the construction of a sewage treatment facility) that would permit the already-approved project to go forward without the concessions, insisting on a connection to the City sewer system.

Petitioners made numerous attempts to break respondents' impasse, but were unable to do so. Both respondents had made their final decisions, at the highest levels of their respective governments. Thus, petitioners were left with two options: they could

abandon the project, or they could wait, in the hope that one respondent or the other would eventually change its mind. The first option, which petitioners were forced into by bankruptcy, proved the finality of respondents' decisions. The second option, which petitioners attempted as long as they were able, did not take away from that finality, as a landowner should not be required to pile one rejection on top of another, on the slight chance that a government, having made the same decision on one, five, or ten occasions, might make a different decision on the eleventh. Petitioners' efforts were sufficient, and any further applications would have been futile.

These allegations, if true, lead inescapably to the conclusion that petitioners' action was ripe for adjudication. *Compare, e.g., Orion Corp. v. State of Washington,* 103 Wash. 2d 441, 693 P.2d 1369, 1377-80 (1985), *on appeal after remand,* 109 Wash. 2d 621, 747 P.2d 1062, 1068-69 (1987) (holding that action was ripe for adjudication even though landowner had made no application for development, since the very purpose of the government regulations was to preclude such development). The district court, however, dismissed petitioners' complaint, holding that "there has been no final determination on [petitioners'] sewer permit application." [App. B, at 3] The court rejected petitioners' arguments to the contrary, characterizing those arguments as "a futility defense" and stating, without elaboration, that petitioners "have not demonstrated futility." [*Id.*] The court of appeals affirmed, not even reaching the question of futility "because we believe the City and the County had not reached an impasse regarding the negotiations on the political concessions." 880 F.2d at 203. [App. A at 8]

By those decisions, the lower courts abdicated their proper jurisdiction, using the principle of ripeness as a means of disposing of this action without the procedural safeguards imposed on a determination on the merits. In *MacDonald, Sommer & Frates v. County of Yolo,* 477 U.S. 340 (1986), and *Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172 (1985), this Court clearly indicated that where a government has reached a final decision on a landowner's land use application, the landowner's section 1983 claim is ripe for adjudication, and must be decided on its merits. In this case, the lower courts have circumvented that requirement through a misuse of the ripeness doc-

trine. By calling their determinations jurisdictional, they have made determinations of fact that, if made on the merits, would have been manifestly improper. Such a shortcutting of the litigation process should be halted immediately, through the establishment of regular procedures for the determination of ripeness, and an application of those procedures in this case.

In several cases, this Court has set forth criteria for the determination of jurisdiction in general. Where the jurisdiction of the district court has been challenged on a motion for dismissal on the pleadings, for example, jurisdiction "is to be determined by the allegations of the complaint." *Moore v. Chesapeake & O. Ry.*, 291 U.S. 205, 210 (1934). On such a challenge, "the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The action should be dismissed only if "plainly insubstantial." *Hurn v. Oursler*, 289 U.S. 238, 240 (1933).

Where the parties have gone beyond the bare pleadings, the standards and requirements are similar. The district court may not dismiss an action simply because it does not feel that the plaintiff will ultimately prevail on its claim. As stated by this Court in *Barry v. Edmunds*, 116 U.S. 550, 559 (1886):

> It might happen that the judge, on the trial or hearing of a cause, would receive impressions amounting to a moral certainty that it does not really and substantially involve a dispute or controversy within the jurisdiction of the court. But upon such a personal conviction, however strong, he would not be at liberty to act, unless the facts on which the persuasion is based, when made distinctly to appear on the record, create a legal certainty of the conclusion based on them.

In determining those facts, the court has inherent authority to issue orders, including orders of discovery, "as necessary for the court to determine and rule upon its own jurisdiction." *United States Catholic Conf. v. Abortion Rights Mobilization, Inc.*, 487 U.S. ____, 108 S. Ct. 2268, 2272, 101 L. Ed. 2d 69, 79 (1988). Included in that authority is the court's ability to limit initial discovery to the question of jurisdiction. *Id.*

Thus, in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the district court had dismissed the plaintiff's action for lack of standing, based on its conclusion that the plaintiff had suffered no injury in fact. The court of appeals reversed that judgment, and this Court affirmed in relevant part, holding that additional development of the facts was necessary, and thus that dismissal on the pleadings was inappropriate at that stage of the proceedings. *Id.* at 377-78.

Similarly, in *Bell v. Hood*, 327 U.S. 678 (1946), the district court had dismissed the plaintiffs' action on the ground that it did not arise under the Constitution or laws of the United States. The court of appeals affirmed that judgment, but this Court reversed. As stated by the Court:

> Jurisdiction . . . is not defeated as respondents seem to contend, by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover. For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

Id. at 682.

In *Barry v. Edmunds*, 116 U.S. 550 (1886), the lower court had dismissed the plaintiff's action, based on its conclusion that the matter in controversy did not meet the jurisdictional amount (then $500), despite the plaintiff's pleading, which had demanded damages in excess of $6,000. This Court reversed that judgment, holding that the plaintiff's claim was colorable, and therefore must control, absent evidence establishing the contrary. *Id.* at 559-65.

And in *Buck v. Gallagher*, 307 U.S. 95 (1939), the district court dismissed the plaintiff's action, for the same reason. In that case, involving the application of a state statute, the plaintiff had offered

to present testimony on the cost of compliance, but the court had rejected that offer on the ground that the cost of compliance was not the proper measure for determining the amount at issue. The plaintiff requested the opportunity to present further evidence, which the trial court denied. This Court reversed the lower court's dismissal, holding that "the refusal to permit additional evidence was error." *Id.* at 103.

These standards should be equally applicable to the question of ripeness, and should be made explicitly so by this Court. Ripeness, like standing and jurisdictional amount, is an element of jurisdiction that is based on, and is therefore dependent on findings of, particular facts. Where jurisdiction is challenged on the basis of the pleadings, the trial court should base its determination on the allegations of the complaint, construing those allegations in favor of the plaintiff. Where the challenge is based on evidence concerning ripeness, the trial court should allow the parties the opportunity to develop the facts to the full extent necessary for the determination, and should permit them to conduct appropriate discovery to establish the relevant facts. Upon presentation of those facts, the court should find jurisdiction unless the facts create "a legal certainty" that the case is not ripe.

Application of those standards here would lead to a reversal of the lower courts' decisions. Petitioners have alleged that respondents made final decisions at the highest levels of their respective governments. The lower courts, however, did consider some evidence purportedly supporting their decisions, basing their factual determinations on a single sentence in one of the documents: the Deputy City Manager's statement that because the City's conditions would require considerable study and discussion, "it does not appear appropriate, at this time, for the City to consider further the connection of the Ravenwood Project to the City's sewer system." Apparently on the basis of that statement, the district court concluded that further applications would not have been futile, and the court of appeals concluded that the City and the County had not reached an impasse.

Those conclusions, however, are erroneous for several reasons. First, the document itself is not so clear that it satisfied the standard, quoted above, set forth in *Barry v. Edmunds*, 116 U.S. at 559. While the Deputy City Manager, as a member of the govern-

ment body that had imposed the conditions and obviously wished to have the County agree to them, may have publicly assumed that the County would agree to them, and thus enter into the "study and discussions" referred to in the document, there is no indication, in the document or elsewhere, that the County had ever agreed to the conditions, or even to a further consideration of them. Moreover, the document hardly expresses a conviction that further applications would have any more success than the prior applications. Its tenor is closer to "don't call us, we'll call you" than to an invitation. In any event, a landowner, having already had its application de facto rejected, should not be required to remake the same application again and again, on a faint hope that, on some occasion, the City or County will change its mind.

Second, petitioners argued to the lower courts that determination of this issue would be premature, and that the district court should permit discovery on the issue. Both courts rejected that argument. Under *Havens Realty Corp. v. Coleman*, 455 U.S. at 377-78, *Bell v. Hood*, 327 U.S. at 682, *Barry v. Edmunds*, 116 U.S. at 559-65, and *Buck v. Gallagher*, 307 U.S. at 103, those decisions were erroneous.

The lower courts, failing even to make specific findings of fact, made factual determinations on the basis of an inadequate record, rejected petitioners' requests for discovery directed to the question of ripeness, and failed to apply procedural safeguards necessary and appropriate to the protection of the parties' rights. In order to establish and clarify the procedural standards applicable to the ripeness issue, and to enforce those standards, this Court should grant certiorari to review the court of appeals' decision.

II

Certiorari is Necessary to Establish Important Procedures for the Administration of Justice

In *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), and *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), this Court established and defined the principle of ripeness as applied to regulatory taking

claims. Specifically, this Court held that "a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. at 186.

This Court, however, has not yet defined the appropriate procedures for the determination of ripeness. In *MacDonald*, the plaintiff's jurisdictional failure was evident on the face of the complaint. *See* 477 U.S. at 342–44. In *Williamson*, on the other hand, the trial court had conducted a full trial on the merits. *See* 473 U.S. at 182–83. Those cases, then, represent the extremes in terms of evidentiary support for a finding on ripeness. Between those two extremes lie the vast majority of regulatory taking cases. In those cases, Supreme Court guidance as to the necessary procedures is warranted.

The district courts and circuit courts have not filled that gap. In the Ninth Circuit, the court of appeals has established substantive standards governing the application of the ripeness doctrine in most circumstances. *See Kinzli v. City of Santa Cruz*, 818 F.2d 1449 (9th Cir. 1987), *cert. denied*, 108 S. Ct. 775, 98 L. Ed. 2d 861 (1988). In that case, the court held that a finding of ripeness requires both rejection of a development plan and denial of a variance. 818 F.2d at 1454. A landowner may avoid that requirement, the court held, if attempts to comply would be futile, as long as the landowner has made at least one meaningful application. *Id.* at 1454–55. It has not, however, established procedural standards for those determinations. As a result, the procedures actually used by the courts have varied widely, raising substantial questions of procedural due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428–32 (1982) (describing the procedural requirements imposed by the due process clause).

In *Herrington v. County of Sonoma*, 834 F.2d 1488 (9th Cir. 1987), *amended on rehearing*, 857 F.2d 567 (9th Cir. 1988), for example, the district court faced questions of compliance with the *Kinzli* requirements and futility. The court made its ripeness determinations after trial, when it had testimony from the pertinent witnesses, tested by cross-examination, on which to base its deci-

sions. In this case, by contrast, the district court, faced with the same issues, failed to make such a careful examination of the underlying facts. In this case, the court made its determinations on the basis of respondents' assertions of fact and one item of evidence, while brushing aside petitioners' allegations and request for discovery on the questions presented.

This disparity in procedure demonstrates the need for procedural guidelines, to ensure that this important and potentially dispositive determination is made with appropriate safeguards. The Supreme Court's "supervision of the administration of [civil] justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence." *McNabb v. United States*, 318 U.S. 332, 340 (1943) (criminal case). On several occasions, this Court has granted certiorari to resolve important procedural issues. *See, e.g., United States v. Hale*, 422 U.S. 171, 173 (1975); *Elkins v. United States*, 364 U.S. 206, 208 (1960); *Mallory v. United States*, 354 U.S. 449, 450 (1957).

In this case, certiorari is particularly warranted, since the procedure used by the district court, and affirmed by the court of appeals, was insufficient to protect petitioners' rights. In this case, the courts took respondents' allegations of fact as true, while disbelieving petitioners' allegations; accepted and relied on a single, ambiguous document as proving an issue of intent, while dismissing petitioners' calls for additional discovery on that question; and denied petitioners an adequate opportunity to present evidence on the issues presented. "As the Court of last resort in the federal system, [the Supreme Court has] supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation." *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984) (Stevens, J., dissenting). In addition to presenting an opportunity to establish and define the appropriate procedures in resolving questions of ripeness, this case presents such an occasion.

In dealing with related issues, this Court has not hesitated to correct procedural inadequacies and to impose necessary safeguards. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), for example, the Court was faced with questions of standing and injury in fact. Finding that additional development of the facts was necessary, the Court held that the district court's dismissal of the action on the pleadings was inappropriate. *Id.* at 377-78. Similarly,

in *Bell v. Hood*, 327 U.S. 678 (1946), the trial court had dismissed the petitioners' complaint for lack of jurisdiction, on the ground that the controversy alleged did not arise under the Constitution of the United States. *See id.* at 680. This Court reversed, correcting the lower courts' procedural errors and setting forth the proper standards to govern such a challenge. *Id.* at 682–83.

This case is similar. In *MacDonald* and *Williamson*, this Court established a set of substantive standards on the question of ripeness in regulatory taking claims. In attempting to apply those standards, the lower courts have used a variety of procedures, some of which have been inadequate to protect the rights of the parties. At this time, neither the Federal Rules of Civil Procedure nor the decisions of the federal courts have defined the procedures necessary to ensure a fair determination of the ripeness issue. In this case, the procedure used was inadequate, with the lower courts making factual determinations without affording petitioners an opportunity to develop and present the pertinent facts to the court. Because of that failure, and the failure of the lower courts to establish and apply necessary procedural safeguards, this Court should grant certiorari for the purpose of defining those standards.

CONCLUSION

For the reasons stated above, petitioners respectfully request that this Court grant their petition for a writ of certiorari.

Respectfully submitted this 11th day of October, 1989.

GRAY, PLANT, MOOTY,
MOOTY & BENNETT, P.A.
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United States Court of Appeals for the Ninth Circuit

No. 88-2504

D.C. No. CV-S-85-534-EJG

OPINION

WILLIAM ST. CLAIR; JOHN SHELTON,
Plaintiffs-Appellants,

v.

CITY OF CHICO; COUNTY OF BUTTE,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
March 17, 1989—San Francisco, California

Filed July 13, 1989

Before: Cecil F. Poole, Robert Boochever and Charles Wiggins, Circuit Judges.

Opinion by Judge Wiggins

SUMMARY

Courts and Procedure

Affirming the district court's dismissal of complaint, the court held that dismissal of complaint for unjust taking was proper because the claims were not ripe for adjudication.

William St. Clair and John Shelton filed suits against the City of Chico and the County of Butte for allegedly denying their rights to equal protection by refusing to permit the construction of an independent sewage treatment facility even though similar projects received such approval, that the City allegedly denied St. Clair's and Shelton's rights to substantive due process and equal protection by imposing conditions on the approval of their application that were unrelated to the project's merits, and that County's and City's actions, taken together, allegedly effected an unconstitutional taking of property without just compensation. The district court granted the County's and City's motions for dismissal, finding the issues were not ripe for adjudication.

[1] The finality requirement under the two-step test (first rejecting a development plan, and then, denying a variance from its regulations) was not satisfied by a rejected proposal for the construction of an independent sewage treatment facility. **[2]** Instead, evidence suggested the County merely postponed serious consideration of the application until St. Clair and Shelton exhausted all opportunity of succeeding on their alternative proposal before the City. **[3]** The County and City were apparently still negotiating with the strong likelihood of agreement when St. Clair and Shelton filed their suit. **[4]** Until the City or County reached a final, definitive position rejecting St. Clair's and Shelton's two alternative proposals for obtaining sewer service to their property, St. Clair and Shelton could not have been deprived of all use of their property.

COUNSEL

Daniel R. Shulman, Minneapolis, Minnesota, for the plaintiffs-appellants.

Fran Layton, San Francisco, California, and Carolee Kildruff, Sacramento, California, for the defendants-appellees.

OPINION

WIGGINS, Circuit Judge:

Appellants William St. Clair and John Shelton timely appeal an order of the district court dismissing their complaint because it considered their claims not ripe for adjudication. Appellants assert that the district court erred both in its legal conclusion and in basing its decision on facts not alleged in the complaint, at least without first permitting discovery. The district court had jurisdiction of this case pursuant to 28 U.S.C. § 1331 (1982) and our jurisdiction rests on 28 U.S.C. § 1291 (1982). We affirm.

I

Appellants brought this action under 42 U.S.C. § 1983 (1982) alleging that the City of Chico's ("City") and the County of Butte's ("County") refusals either to connect Appellants' proposed real estate project to an existing sewer system or allow them to construct their own treatment facility effected an unconstitutional taking of their property and also deprived them of their constitutional rights to due process and equal protection of the laws. Appellants alleged in their complaint that they began the permitting process for approval of their proposed "Ravenwood" development by first receiving a required zoning change from the the County. As a condition to that zoning change, however, the County required Appellants to connect their project to the City's sewer system. According to the allegations of the complaint, the City initially approved Appellants' application for a sewer connection, but subsequently conditioned its approval on the County's political concessions to matters that allegedly were unrelated to the merits of the Ravenwood development. Appellants further alleged in their complaint that the County would not accede to these conditions, nor would the City permit the sewer connection without them. Fearing an impasse, Appellants sought the County's approval for the construction of an independent sewage treatment facility. But the County, allegedly in a final decision from which no appeal or variance was possible, refused the application and continued to condition approval of the project on its connection to the City's

sewer system. According to the complaint, similar projects received the County's approval for the construction of independent treatment facilities. The complaint concludes that the impasse reached between the City and the County ultimately caused Ravenwood to enter bankruptcy.

Both the City and County filed motions of dismissal contending either that, under Fed. R. Civ. P. 12(b)(6) Appellants were not entitled to relief, or that under Fed. R. Civ. P. 12(b)(1) the district court was without federal jurisdiction. The City contested the complaint's factual allegations that approval of the sewer connection was all but complete before the dispute between the City and the County arose. Rather, the City referred to evidence in the record that approval of the connection depended, at least in part, on the annexation of the Ravenwood project to the City. In addition, both the City and the County contested the complaint's factual allegations that an impasse had been reached on the alleged political concessions. Both parties contended that discussions were continuing and that Appellants were never led to believe by either party that their project would not ultimately receive the necessary approval. The district court concluded that Appellants' claims were not ripe for adjudication both because there was never a "final decision" rejecting the proposed sewer connection and because Appellants' failure even to attempt annexation belied their argument that annexation would have been futile. Accordingly, the district court dismissed Appellants' complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1).

II

The main issue in this case is accompanied by a procedural problem that we consider first. Appellants note that the district court's decision dismissing their complaint expressly rested on exhibits outside the complaint. Appellants argue that the decision is in error because the district court failed to assume the truth of the facts alleged in the complaint and that those facts do not support its conclusion. The district court did not err.

Whether a claim is ripe for adjudication goes to a court's subject matter jurisdiction under the case or controversy clause of arti-

cle III of the federal Constitution. *Unity Ventures v. County of Lake*, 841 F.2d 770, 774 (7th Cir.), *cert. denied*, 109 S. Ct. 226 (1988). Like other challenges to a court's subject matter jurisdiction, motions raising the ripeness issue are treated as brought under Rule 12(b)(1) even if improperly identified by the moving party as brought under Rule 12(b)(6). *See Biotics Research Corp. v. Heckler*, 710 F.2d 1375, 1379 (9th Cir. 1983). *See generally* 5 C. Wright & A. Miller, *Federal Practice & Procedure* § 1350 (1969). Unlike a Rule 12(b)(6) motion, a Rule 12(b)(1) motion can attack the substance of a complaint's jurisdictional allegations despite their formal sufficiency, and in so doing rely on affidavits or any other evidence properly before the court. *See Thornhill Publishing Co. v. General Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979); *see also* C. Wright & A. Miller, *supra*, § 1350, at 550–51. It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction. The district court obviously does not abuse its discretion by looking to this extra-pleading material in deciding the issue, even if it becomes necessary to resolve factual disputes. *See Thornhill Publishing*, 594 F.2d at 733.

There are only a few procedural limitations placed on a district court when it faces a factual challenge to a complaint's jurisdictional allegations. *See* C. Wright & A. Miller, *supra*, § 1350, at 558–59; *see also Crawford v. United States*, 796 F.2d 924, 929 (7th Cir. 1986) ("No format is specified by statute or rule for evidentiary hearings on jurisdiction; any rational mode of inquiry will do."). Appellants argue that two such limitations apply here, but we find them both inapposite. Appellants assert first that the district court erred in denying them the opportunity of conducting additional discovery before making its decision. Discovery is necessary, however, only if it is possible that the plaintiff can demonstrate the requisite jurisdictional facts if afforded that opportunity. *See Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977). Where, as here, the extra-pleading material demonstrates that the controlling questions of fact are undisputed, additional discovery would be useless. *Cf. Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.) ("Insofar as the defendant's

motion to dismiss raises factual issues, the plaintiff should have an opportunity to develop and argue the facts in a manner that is adequate in the context of the disputed issues and evidence."), *cert. denied*, 454 U.S. 897 (1981). Also, Appellants have not explained why they failed to conduct adequate discovery on the jurisdictional issue even though they conducted substantial discovery on the merits of their claims during the period preceding the filing of the City's and the County's motions for dismissal. *Cf. Berardinelli v. Castle & Cooke Inc.*, 587 F.2d 37, 39 (9th Cir. 1978) (per curiam) (rejecting similar argument in part because plaintiff made no effort to undertake any discovery during period between filing of complaint and filing of motion to dismiss). The district court did not err in denying Appellants the opportunity to conduct additional discovery under these circumstances.

Appellants argue next that the district court should have reserved decision on the jurisdictional issue until after a completed trial on the merits. They concede that ordinarily the issue of jurisdiction is for the district judge to decide, but they contend that a jurisdictional issue that is "intertwined" with the merits must be decided by a jury and, as a result, must await trial on the merits. The problem with Appellants' argument is that "the jurisdictional issue and the issue on the merits are [not] factually so 'completely intermeshed,' *McBeath v. Inter-American Citizens for Decency Committee*, 374 F.2d 359, 362-63 (5th Cir. 1967), that 'the question of jurisdiction is dependent on decision of the merits,' *Land v. Dollar*, 330 U.S. 731, 735 (1947)." *Berardinelli*, 587 F.2d at 39. As we made clear in *Herrington v. County of Sonoma*, 857 F.2d 567 (9th Cir. 1988), *modifying* 834 F.2d 1488 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1557 (1989), the issue of ripeness has nothing to do with the merits of claims challenging land use regulations and, indeed, a district court errs if it submits the issue to the jury. *See id.* at 568. In short, the district court did not err in deciding the ripeness issue under the terms of Fed. R. Civ. P. 12(b)(1).

III

The focus of this appeal is on the district court's legal conclusion that Appellants' claims against the City and the County were

not ripe for adjudication. We review this decision de novo. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1453 n.4 (9th Cir. 1987), *modified*, 830 F.2d 968 (9th Cir.), *cert. denied*, 108 S. Ct. 775 (1988). There are essentially three claims underlying Appellants' complaint. First, the County allegedly denied Appellants' rights to the equal protection of the laws by refusing to permit the construction of an independent sewage treatment facility even though similar projects received such approval. Second, the City allegedly denied Appellants' rights to substantive due process and equal protection of the laws by imposing conditions on the approval of their application that were unrelated to the merits of the project. And third, the County's and the City's actions, taken together, allegedly effected an unconstitutional taking of Appellants' property without just compensation. Each of these claims is subject to the same ripeness standards that are applied generally to constitutional challenges of land use regulations. *Herrington*, 857 F.2d at 569 & n.1.

The purpose of the ripeness doctrine is to avoid premature judicial review of administration action. This goal is accomplished by deferring review of a planning commission's land use decisions until they represent a "'final, definitive position regarding how it will apply the regulations at issue to the particular land in question.'" *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986) (quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 191 (1985)). The finality requirement is satisfied only if the planning commission first rejects a "development plan" and then denies a variance from its regulations. *E.g., Herrington*, 857 F.2d at 569; *Kinzli*, 818 F.2d at 1454. This two-step test can be avoided only if compliance would be futile, and even then only if the property owner first makes at least one "meaningful application." *Herrington*, 857 F.2d at 569; *Kinzli*, 818 F.2d at 1454-55.

[1] Appellants argue here that the district court erred in concluding that each of its claims failed to satisfy these requirements. There is no question that this case does not concern the submission, consideration, and rejection of a "development plan," as in *Herrington* and *Kinzli*. Appellants contend nonetheless that the finality requirement can be met "by a rejected application or proposal for [a sewer] connection." *Unity Ventures v. County of*

Lake, 841 F.2d 770, 775 (7th Cir.), *cert. denied*, 109 S. Ct. 226 (1988), and, analogously, by a rejected proposal for the construction of an independent sewage treatment facility. Although we recognize this to be a correct statement of the law, we reject the corollary to Appellants' argument that both the City and the County reached final decisions rejecting their alternative proposals for obtaining sewer service to their property.

[2] Regarding the claim against the County, Appellants assert that they sought approval for the construction of an independent treatment facility but were turned away in a final decision from which no variance was possible. The district court concluded otherwise, apparently believing that the County rejected Appellants' claim only because it believed they had not yet received a rejection from the City on their application for a connection to the City's sewer system. Presumably, then, if the City had ultimately rejected that proposal the County would have reconsidered its position regarding Appellants' application for the construction of an independent treatment facility. Undisputed material in the record supports such a determination. Exhibit E, attached to the Declaration of David M. Coyne, Appellants' own attorney, indicates that the Planning Commission recommended approval of the proposed treatment facility, but only on condition that, among other things, "all efforts" must first "have been exhausted with the City of Chico to get approval of the hookup to the sewer system." This evidence suggests that the County merely postponed serious consideration of Appellants' application until they exhausted all opportunity of succeeding on their alternative proposal.

[3] Regarding their claim against the City, Appellants argue essentially that the City placed two conditions on the acceptance of their application for a sewer connection: first, the County's concessions to political demands, and second, Appellants' annexation of their property to the City. Appellants argued below, and reassert here, that because the first condition could never be satisfied their compliance with the second condition would have been futile. We need not address Appellants' futility argument, however, because we believe the City and the County had not reached an impasse regarding the negotiations on the political concessions. Therefore, they could have ultimately reached an agreement that would have satisfied the first condition to Appellants' application.

Undisputed material in the record supports this conclusion, too. Responding to Appellants' inquiry into the progress of their application, the City wrote that it was inappropriate "at [that] time" to consider the merits of their application pending intensive study and discussion with the County "during the coming months." A letter from the County similarly indicated that negotiations between the two entities were continuing. The proper inference from both communications is not only that an agreement was possible, but even likely.[1] Appellants never offered any evidence below to rebut this inference, nor did they offer any support for their allegations that the two entities reached an impasse. Under these circumstances it is obvious to us that Appellants failed to satisfy their burden of showing that their application for a connection to the City's sewer system was rejected in a final, definitive decision.

[4] Appellants' claim for the taking of their property without just compensation is, obviously, not ripe for these same reasons. Neither the City nor the County reached final, definitive positions rejecting either of Appellants' two alternaive proposals for obtaining sewer service to their property. Until both alternatives were foreclosed, Appellants certainly could not have been deprived of "all use of [their] property," as they allege in their complaint. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987). This conclusion obviates any need for us to consider Appellants' additional argument that their failure to exhaust state remedies for obtaining compensation for inverse condemnation is excused because that remedy was inadequate in California at the time they initiated their suit. *Cf. Kinzli*, 818 F.2d at 1456 (discussing adequacy of California procedures and remedy for inverse condemnation).

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[1] Appellants do not suggest that their takings claim is based on a considerably "excessive delay" in the application process, and would find it impossible to do so because, as we have stated before, a delay of up to eight years may still be inadequate to satisfy the ripeness requirement. *See Kinzli*, 818 F.2d at 1454 n.5.

IV

The district court properly dismissed Appellants' complaint under Fed. R. Civ. P. 12(b)(1) on the ground that their claims were not ripe for adjudication.

AFFIRMED.

In the United States District Court
for the Eastern District of California

No. CIV. 2-85-534-EJG

WILLIAM ST. CLAIR and
JOHN SHELTON,

Plaintiffs,

v.

CITY OF CHICO, COUNTY OF
BUTTE, et al.,

Defendants.

BEFORE THE HONORABLE EDWARD J. GARCIA,
U.S. DISTRICT JUDGE

REPORTER'S TRANSCRIPT OF PROCEEDINGS
FRIDAY, FEBRUARY 12, 1988

JAMES G. VINE, CSR, License No. 1515

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THE COURT: This case was on calendar on October 9, 1987, on plaintiff's motion to amend under Rule 15(a) to add a second cause of action alleging a taking of their property, quote, without due process, unquote, based on two then recent Supreme Court cases involving land use regulations and that was Nollan against California Coastal Commission and First English Evangelical Lutheran against County of Los Angeles. Defendant, City of Chico, opposed the motion on procedural and abstention grounds without addressing the substantive basis for plaintiff's motion, that is, without addressing the applicability of the cited recent cases to plaintiff's claims and, in fact, one of the defendants, the County of Butte, filed nothing in opposition and didn't oppose. We, thus, granted the motion without prejudice to any motion defendants might bring to dismiss the amended complaint, thus, leaving for another day, that is, today, a full analysis of plaintiff's, quote, taking without due process claim, unquote. We expressly modified the law and motion schedule to allow time for defendants to address motions to the amended complaint that was ordered filed. Both defendants now move to dismiss the two causes of action pled in the third amended complaint on several alternative theories for lack of subject matter jurisdiction and for failure to state a claim. Because I agree with defendants' argument that the complaint should be dismissed for lack of ripeness, I do not reach the other alternative bases urged for dismissal, except to note that the motion to amend was probably improvidently granted by this Court because it appears that the cases of Nollan against California Coastal

Commission does not support plaintiff's cause of action for, quote, taking without due process, unquote, as alleged. Because the Court on these motions has considered exhibits outside the complaint, it grants both defendants' motions to dismiss pursuant to Federal Rule 12(b)(1) for lack of subject matter jurisdiction.

The Court finds that the two Supreme Court cases cited by defendants, McDonald against Yolo County and Williamson against Hamilton Bank, dispositive on this issue of ripeness finding that there is no judicable controversy because there has been no final determination by either defendant on plaintiff's sewer permit application. There being no judicable controversy, this Court lacks subject matter jurisdiction. Plaintiffs' only response to defendants' lack of ripeness argument is a futility defense, however, the Ninth Circuit, Kinzli against City of Santa Cruz case, cited by defendants, is dispositive on this contention. This case clearly held under similar circumstances that plaintiffs have not demonstrated futility. Defendants' 12(b)(1) motions are granted as to both causes of action pled in this third amended complaint, the Fifth Amendment taking claim and the Fourteenth Amendment equal protection claim. On the dismissal of this latter cause of action, see also Herrington against County of Sonoma, cited by defendant Butte County.